

BLANK PAGE

FILE COPY

Office - Bureau of Internal Revenue
SEP 28 1940

CHARLES HUBBARD GOWLEY
CLERK

Joint Motion of the United States

Attorneys General

**GUY T. HAYWARD, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER**

vs.

EDWARD VAN RAN CAMPBELL

Respondent

**GUY T. HAYWARD, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER**

vs.

MARGARET K. CAMPBELL

Respondent

**GUY T. HAYWARD, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER**

vs.

EDMUND H. KNOX

Respondent

**GUY T. HAYWARD, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER**

vs.

DOROTHY K. G. BROWN

Respondent

**PETITION FOR WRIT OF HABEAS CORPUS TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT**

BLANK PAGE

INDEX

Page

Opinions below.....	2
Jurisdiction.....	2
Questions presented.....	3
Statutes and regulations involved.....	4
Statement.....	4
Specification of errors to be urged.....	12
Reasons for granting the writs.....	14
Conclusion.....	15
Appendix.....	17

CITATIONS

Cases:

<i>Beers v. Commissioner</i> , 78 F. (2d) 447, certiorari denied, 296 U. S. 620.....	15
<i>Brewster v. Gage</i> , 280 U. S. 327.....	15
<i>Chandler v. Field</i> , 63 F. (2d) 13, certiorari denied, 289 U. S. 758.....	15
<i>Commissioner v. Libbey</i> , 100 F. (2d) 458.....	14
<i>Commissioner v. Maguire</i> , 111 F. (2d) 843.....	14, 15
<i>Hopkins v. Commissioner</i> , 69 F. (2d) 11, certiorari denied, 293 U. S. 560.....	15
<i>Jenkins v. Smith</i> , 21 F. Supp. 433, reversed, 99 F. (2d) 827.....	14
<i>McFeely v. Commissioner</i> , 296 U. S. 102.....	15
<i>Warner v. Commissioner</i> , 72 F. (2d) 225, certiorari denied, 293 U. S. 620.....	15

Statutes:

Revenue Act of 1928, c. 852, 45 Stat. 791:	
Sec. 101.....	18
Sec. 111.....	17
Sec. 113.....	17
Revenue Act of 1932, c. 209, 47 Stat. 169:	
Sec. 113.....	20

Miscellaneous:

Treasury Regulations 77, promulgated under the Revenue Act of 1932, Art. 58.....	20
-------------------------------------------------------------------------------------	----

BLANK PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. _____

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

v.

RICHARD VAN NEST GAMBRILL

No. _____

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

v.

MARJORIE K. CAMPBELL

No. _____

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

v.

SEYMOUR H. KNOX

No. _____

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

v.

DOROTHY K. G. ROGERS

(1)

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Second Circuit entered in the above causes, affirming the decisions of the Board of Tax Appeals.

OPINIONS BELOW

The Board of Tax Appeals promulgated a separate opinion in each of these cases. (Gambrill, R. 18-31; Campbell, R. 191-200; Knox, R. 81-85; Rogers, R. 157-159.) The opinion in the Gambrill case is reported in 38 B. T. A. 981; the opinion in the Campbell case is reported in 39 B. T. A. 916, and the memorandum opinions in the other two cases are unreported.

The court below rendered one opinion in respect of all four cases, which is reported in 112 F. (2d) 530.

JURISDICTION

The judgments of the court below were entered on June 28, 1940, in the Gambrill case (R. 58-59), and on June 29, 1940, in the Campbell, Knox, and Rogers cases (Campbell, R. 235; Knox, R. 117; Rogers, R. 193). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. What is the correct basis for computing gain or loss upon the sale of securities by a distributee of a testamentary trust? Three types of securities are involved:

(a) Securities owned by the decedent at the time of death. (Presented in Gambrill, Campbell, and Rogers cases.)

(b) Securities not owned by the decedent at the time of death but purchased by the trustees. (Presented in all four cases.)

(c) Securities not owned by the decedent at time of death, but purchased by the executors and delivered to the trustees. (Presented in Campbell and Rogers cases.)

2. In computing the holding period under Section 101 of the Revenue Act of 1928 relating to capital gains and losses, is the period to be measured from the date of delivery by the trustees to the distributee, or is it to be measured from the date of the decedent's death in the case of securities of the type involved in 1 (a), *supra*, and from the date of purchase in the case of securities of the type involved in 1 (b), *supra*? (Presented in Gambrill and Knox cases.)

3. Where stock was purchased by a taxpayer prior to receipt by her from the trustees of other shares of the same kind, should the time of receipt from the trustees or the time of acquisition by the fiduciaries govern the application of the "first in, first out" rule? (Presented in Campbell case.)

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 17-20.

STATEMENT**Gambrill case**

The facts found by the Board of Tax Appeals (R. 19-25) may be summarized as follows:

On November 20, 1897, Mary Van Nest, grandmother of the taxpayer, died, leaving a will, the ninth article of which provided as follows (R. 19-20):

NINTH: All the residue of my estate of every kind I give and devise as follows:

One half thereof in equal shares to my daughters Mary Van Nest Jackson, Anna Van Nest Gambrill, and Jennie Van Nest Foster, and my granddaughter, Mary Alice Van Nest absolutely.

The other half thereof in four equal shares to my executors, to hold the same in trust, one share for the benefit of each of the same four persons, to wit, my said three daughters and my said granddaughter and to receive the income and pay the same to her during her life with full power to invest and reinvest in their discretion without any limitation whatsoever and at her death to transfer and deliver the same as she if leaving issue shall by will direct or in the absence of such direction, to her issue equally, or if she shall leave no issue, then to the survivors

- of the said four persons, to wit, my said three daughters and my said granddaughter, and to the issue of any of the said four persons who may have died, the issue to take the share which the parent would have taken if living. * * *

On January 4, 1898, the executors delivered to themselves, as trustees for Anna Van Nest Gambrell, the mother of the taxpayer, certain securities of a value of \$222,631.25 (R. 20-21).

On March 23, 1928, Anna Van Nest Gambrell died without having exercised the power of appointment (R. 21). The taxpayer was the sole surviving issue of his mother and was born prior to the death of his grandmother, Mary Van Nest (R. 21).

On May 5, 1928, the trustees, after settling their accounts, delivered the balance of the corpus of the trust, consisting of securities, to the taxpayer as the remainderman (R. 22). Some of the securities were part of the original trust *res* (R. 26), and others had been purchased by the trustees with trust funds, both prior to and subsequent to March 1, 1913 (R. 23-24).

In February 1930, on May 6, 1930, and in June 1930, the taxpayer sold some of those securities (R. 22-23).

The taxpayer used the fair market value as of May 5, 1928, the date the securities were delivered to him by the trustees, as the basis for computing gain or loss on the sales (R. 22). And in computing

the period during which he had held these securities, for the purpose of determining the applicability of the capital gain or loss provisions in Section 101 of the Revenue Act of 1928, taxpayer used the same date, May 5, 1928, from which to measure that period (R. 25).

The Commissioner of Internal Revenue, on the other hand, ruled that as to securities forming part of the original trust *res*, the date the executors transferred the securities to the trustees, January 4, 1898, constituted the date of "distribution to the taxpayer" (R. 12, 20, 28). As to securities purchased by the trustees out of trust funds prior to March 1, 1913, the Commissioner used the March 1, 1913, value as a basis for computing gain or loss since the cost to the trustees was unknown. As to securities purchased by the trustees subsequent to March 1, 1913, the Commissioner used the cost to the trustees as a basis for computing gain or loss (R. 12, 28).

In determining the period of holding by the taxpayer for capital gains purposes, as to securities forming part of the original trust *res*, the Commissioner used as the basic date, November 20, 1897, the date of the death of Mary Van Nest, and as to securities purchased by the trustees he used the dates of purchase (R. 25).

The Board of Tax Appeals sustained the taxpayer's position, holding that the "time of distribution" to the taxpayer under Section 113 (a) (5)

of the Revenue Act of 1928, was May 5, 1928, when the property was actually delivered by the trustees to the taxpayer, and that the fair market value of the securities on that date was to be used in computing gain or loss (R. 29). And it similarly held that May 5, 1928, was the basic date for determining the applicability of the capital gains provisions, with the consequence that the securities sold in February 1930 had not been held by the taxpayer for more than two years and were therefore not capital assets, but that the securities sold on May 6 and in June 1930 had been held by the taxpayer for more than two years and were capital assets (R. 31).

Upon appeal by the Commissioner, the court below affirmed the decision of the Board.

Campbell, Knox, and Rogers cases

The facts found by the Board of Tax Appeals (Campbell, R. 192-196; Knox, R. 81-84; Rogers, R. 157-159) may be summarized as follows:

Seymour H. Knox, father of these three taxpayers, died May 16, 1915 (Campbell, R. 192; Knox, R. 82; Rogers, R. 157). His will provided that the residuary estate should be divided into four parts and that one part, consisting of 20 percent of the whole, should be placed in trust for the taxpayer, Marjorie Knox Campbell, for the following uses and purposes (Campbell, R. 193-194):

To receive, hold, and, from time to time, invest and reinvest the same, and to collect

the rents, income, issues and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my said trustees shall seem wise and proper toward the support, maintenance and education of my daughter, MARJORIE KNOX, until she shall arrive at the age twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over the accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter, MARJORIE KNOX, until she shall arrive at the age of twenty-eight (28) years, at which time, I give, devise and bequeath to my said daughter, MARJORIE KNOX, one-half ($\frac{1}{2}$) of the property then constituting said trust fund and I direct my said trustees to pay over the net income on the remaining one-half ($\frac{1}{2}$) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise and bequeath the remaining part of said trust fund to my said daughter, MARJORIE KNOX, and to her heirs and assigns forever.

In the event that my said daughter, MARJORIE KNOX, shall die before reaching the age of thirty-five (35) years, I give, devise and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not en-

titled, unto the issue of said MARJORIE KNOX, if any, surviving her, to be divided among them, share and share alike. And in case there be no issue her surviving, then I give, devise and bequeath said trust fund unto her heirs.

Another 20 percent was placed in trust for the taxpayer, Dorothy Knox Rogers, in exactly the same terms (Rogers, R. 157-159).

A third 20 percent was placed in trust for the taxpayer, Seymour H. Knox, in the same terms except that when he reached the age of 25 he was to get \$500,000 of the trust fund, when he became 30 he was to get one-half of the remaining trust fund and at 35 he was to receive the balance. The income was payable to him in the meantime (Knox, R. 82-83).

The trusts were formally established on July 1, 1921, and the executors on that date transferred to the trustees the property as provided in the will (Campbell, R. 194; Rogers, R. 80).

Mrs. Campbell attained the age of 28 on July 10, 1928, and received on that date one-half of the property then constituting her trust fund. Certain of the securities which she received at that time were sold during 1933 and certain of the bonds matured and were paid during 1933. Some of the securities sold by her had been held by her father at the time of his death, others had been purchased by the executors and still others had been purchased by the trustees (Campbell, R. 194).

Mrs. Campbell owned certain shares of stock which she had purchased prior to July 10, 1928. She received from the trustees on that date additional shares of the same stock. She sold some of the shares in 1933. She applied the "first in, first out" rule in making up her return for 1933 and regarded her individual purchases as the stock first purchased, used the basis applicable to those shares until it was exhausted, and then used as the basis for the remaining shares sold the fair market value of the shares on July 10, 1928 (Campbell, R. 195-196).

Seymour Knox attained the age of 30 on September 1, 1928, and became entitled to receive and did receive on that date one-half of the trust fund then remaining in the hands of the trustees. In this connection, he received 8,575 shares of stock of Marine Share Corporation, of which 5,160 were purchased by the trustees on August 31, 1927, and 3,415 were purchased by the trustees on August 30, 1928. The fair market value of those shares was \$473,768.75 on September 1, 1928. Mr. Knox exchanged those shares thereafter in a nontaxable exchange and sold the shares received in that exchange on June 10, 1930, for \$287,193.67 (Knox, R. 83-84).

Mrs. Rogers became 28 on August 26, 1924, and 35 on August 26, 1931, on both of which days she received distributions in accordance with terms of the trust. She had a number of transactions in the taxable year (1933) involving securities so received

from the trustees. Some of these securities had been purchased by the trustees, some by the executors and some of them had been owned by her father at the date of his death (Rogers, R. 159).

The Commissioner took the position that the basis for determining gain or loss for securities owned by the decedent at the time of his death was the fair market values on dates of transfer from executors to trustees; in the case of securities purchased by the trustees, the cost thereof to the trustees; and, in the case of securities purchased by the executors, either cost to the executors or value at time of distribution by executors to trustees (Campbell, R. 194; Knox, R. 84; Rogers, R. 159). In computing the period of holding for the purpose of determining the applicability of the capital gains provisions in the Seymour Knox case, the Commissioner took the view that the taxpayer acquired the securities in question when the trustees purchased them (Knox, R. 84). In applying the "first in, first out" rule in the Campbell case, the Commissioner ruled that the first shares purchased were those received from the trustees since they were acquired prior to the date upon which the taxpayer had purchased her similar shares (Campbell, R. 196).

The Board ruled that the dates of delivery by trustees to the taxpayers should govern the determination of these questions, and on appeal by the Commissioner the court below affirmed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the words "time of distribution to the taxpayer", used in Section 113 (a) (5) of the Revenue Acts of 1928 and 1932, mean the time of actual delivery by the trustees to the taxpayer-beneficiary and not the time of transfer from executors to trustees. (This assignment applies to the Gambrill, Campbell and Rogers cases.)

2. In holding that the bases for determining gain or loss on the sales here involved were values at dates of transfer from the trustees to the taxpayers, respectively. (This assignment applies to each of the instant cases.)

3. In holding that the dates of transfer from the trustees to the taxpayers should govern in determining the holding period for purposes of computing capital gains or losses under Section 101 of the Revenue Act of 1928. (This assignment applies to the Gambrill and Knox cases.)

4. In holding that the time of transfer from the trustees to the taxpayer should govern in determining when securities were acquired for purposes of applying the "first in, first out" rule. (This assignment applies to the Campbell case.)

5. In not holding as to securities owned by the decedent at time of death and transferred from the executors to the taxpayers through the trustees, that the basis for determining gain or loss is value at time of delivery from executors to trustees, or,

where such delivery was made prior to March 1, 1913, the value at time of delivery or March 1, 1913, value, whichever is greater. (This assignment applies to the Gambrill, Campbell and Rogers cases.)

6. In not holding as to securities purchased by the trustees and transferred to taxpayers, that the basis for determining gain or loss is cost to the trustees or fair market value at March 1, 1913, where purchased prior to March 1, 1913, and cost is unknown. (This assignment applies to each of the instant cases.)

7. In not holding as to securities purchased by the executors and transferred to taxpayers through the trustees, that the basis for determining gain or loss is cost to the executors, or, in the alternative, value at time of transfer from executors to trustees. (This assignment applies to the Campbell and Rogers cases.)

8. In not holding that for purposes of determining capital gains, the securities were held and acquired by the taxpayer from the dates of acquisition by the trustees, that is, date of decedent's death as to securities owned by him at death and dates of purchase as to securities purchased by trustees. (This assignment applies to the Gambrill and Knox cases.)

9. In not holding that for purposes of applying the "first in, first out" rule, the securities were held and acquired by the taxpayer from the dates of acquisition by the trustees, that is, date of decedent's

death as to securities owned by him at death and dates of purchase as to securities purchased by the trustees. (This assignment applies in the Campbell case.)

10. In affirming the decisions of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRITS

As recognized by the Circuit Court of Appeals (Gambrill, R. 57), the decision below is in conflict with *Commissioner v. Maguire*, 111 F. (2d) 843 (C. C. A. 7th), as to the first question presented. The Government is not opposing the taxpayer's petition for certiorari in the *Maguire* case, No. 346, present Term. The decision below is also in conflict with *Jenkins v. Smith*, 21 F. Supp. 433 (Conn.), reversed on other grounds, 99 F. (2d) 827 (C. C. A. 2d), but is in accord with *Commissioner v. Libbey*, 100 F. (2d) 458 (C. C. A. 1st), one judge dissenting.

Although the *Maguire* case dealt only with securities of the type involved in 1 (a) and 1 (b) of the questions presented herein, the reasoning of the *Maguire* decision would likewise prevent using the date of delivery by the trustees to the beneficiaries as the critical date for the securities involved in 1 (c).¹ Accordingly, if certiorari is granted here,

¹ The Government contends that as to securities falling in group (c), the basis for computing gain or loss should be cost to the executors. However, we will contend in the alternative that the basis should be value at the time of delivery by the executors to the trustees.

the writs should embrace all three types of securities.

In addition, these cases present two further questions not decided in the *Muguire* case, involving the selection of the critical date for computing the holding period for capital gains purposes, as well as for the application of the "first in first out" rule. Both questions are closely related to the main question presented, and we believe that it will be of assistance to the Court in obtaining a complete picture to have all the questions presented before it. Moreover, the decision below with respect to the holding period conflicts in principle with *McFeely v. Commissioner*, 296 U. S. 102.²

CONCLUSION

The questions here presented are important. There is a direct conflict as to the basic issue, and the other two issues are so closely interwoven with

² Although the court below attempted to distinguish the *McFeely* case, we believe the distinction to be unsound, particularly in view of prior decisions by that court and other circuit courts of appeals to the effect that the rule of *Brewster v. Gage*, 280 U. S. 327, followed in the *McFeely* case, is not affected by the intervention of a testamentary trust. See *Warner v. Commissioner*, 72 F. (2d) 225 (C. C. A. 2d), certiorari denied, 293 U. S. 620; *Chandler v. Field*, 63 F. (2d) 13 (C. C. A. 1st), certiorari denied, 289 U. S. 758; *Hopkins v. Commissioner*, 69 F. (2d) 11 (C. C. A. 7th), certiorari denied, 293 U. S. 560; *Beers v. Commissioner*, 78 F. (2d) 447 (C. C. A. 9th), certiorari denied, 296 U. S. 620.

the main issue as to call for review of all the questions presented. It is therefore respectfully submitted that this petition for writs of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

SEPTEMBER, 1940.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS.

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(5) *PROPERTY TRANSMITTED AT DEATH.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was ac-

quired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. * * *

(b) *Property acquired before March 1, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be:

- (1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided), or
- (2) the fair market value of such property as of March 1, 1913,

whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

(c) *Definitions.*—For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

(5) "Capital net gain" means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains.

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or ex-

change, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

* * * * *

The corresponding provisions of Section 113 (a) (5) and (13) of the Revenue Act of 1932 are substantially the same as those of Section 113 (a) and (b) above quoted.

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 58. *Sale of stock and rights.*—When shares of stock in a corporation are sold from lots purchased at different dates or at different prices and the identity of the lots can not be determined, the stock sold shall be charged against the earliest purchases of such stock. In the determination of the earliest purchases of stock the rules prescribed in subparagraphs (A), (B), (C), and (D) of section 101 (c) (8) (relating to the period for which property has been held) shall be applied. The excess of the amount realized on the sale over the cost or other basis of the stock will constitute gain. * * *

BLANK PAGE